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Supreme Court, U.S.
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No ___

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

FRANCISCO S. JIMINEZ, et al.

Petitioners,

V.

BP OIL, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a Maryland statute mandating as a term of the parties' contract, that a petroleum franchisor pay its franchisee for business goodwill under certain circumstances, is preempted by the Petroleum Marketing Practices Act ("PMPA") when the state statute does not involve, and the PMPA only applies to, grounds for, or notice requirements with respect to, franchise termination or nonrenewal.

LIST OF PARTIES

The parties to the proceeding below were petitioners, Francisco S. Jiminez, Carlos Horcasitas, James G. Palmer, Torsak Rossaki, French Ray, Leon Uzarowski, Anton A. Bond, Farzin Afsahi, Ojan Fakhriyazdi, Firouz Rezazedeh, Sam Akindura, Edward Parlier, Luiz Azucena, Lalith Gnanasiri, Yoav Portnoy, Boo H. Chung and Jeffrey H. Kormann; and respondent, BP Oil, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Francisco S. Jiminez, et al. ("Jiminez") petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit which was entered on August 8, 1988, and the denial of petition for rehearing which was entered on November 16, 1988.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 853 F.2d 268 and is reprinted as Appendix A. The Opinion of the United States District Court for the District of Maryland is reported at 652 F.Supp. 329, and is reprinted as Appendix B. The Opinion of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing is reprinted as Appendix C.

JURISDICTION

The court of appeals entered judgment on August 8, 1988 (App. A, *infra*, 1a), and denied a petition for rehearing on Novem-

ber 16, 1988. (App. C., *infra*, 25a). This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 6(a) of Subtitle I of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. 2806(a), provides:

> "(a) To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title."

Section 11-304 of the Maryland Gasohol and Gasoline Products Marketing Act (the "Maryland Act"), Md. Comm. Law Code Ann. 11-304 (1983 Repl.Vol.), provides in pertinent part:

> " (a) In general. - Every marketing agreement is subject to the provisions of this section, whether or not expressly set forth in the agreement.
>
> (i)Payment of goodwill. - (1) In addition to the provisions of subsection (h) of this section, if, without the written consent of the dealer, the distributor terminates, cancels or unreasonably refuses to renew the marketing agreement, the distributor shall pay to the dealer the full value of any business goodwill which the dealer enjoys at the time he is notified of the termination, cancellation or refusal to renew.

(2) The distributor shall make the payment required by this subsection within 30 days from the effective date of the termination, cancellation or refusal to renew.

(3) This subsection does not apply if the dealer materially breaches the marketing agreement."

STATEMENT OF THE CASE

Petitioners are all former franchisees of Respondent, BP Oil, Inc. ("BP"), who operated BP retail service stations in the Baltimore-Washington, D.C. area pursuant to written three-year franchise agreements. This case arose when BP, as permitted under PMPA, 15 U.S.C. 2801-2806, terminated petitioners' franchises, and withdrew from the marketing of gasoline in the relevant geographic area. *See*, 15 U.S.C. 2802(b)(2)(E).

On March 26, 1986, Petitioners sued BP, along with Crown Central Petroleum Corporation ("Crown"), the refiner to which BP was transferring most of the service station properties. Petitioners sought preliminary injunctive relief under PMPA to prevent the franchise terminations, and money damages under the Maryland Act for the value of their business goodwill.[1]

Petitioners' request for injunctive relief was denied, and BP transferred its properties to Crown on April 1, 1986.[2] Petitioners later dismissed Crown from their action and filed an Amended Complaint for damages against BP, alleging both PMPA and Maryland Act violations.[3]

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[1] Jurisdiction in the District Court was based on 15 U.S.C. 2805, 28 U.S.C. 1337, and pendant jurisdiction.

[2] At the time of the transfer, some of the Petitioners became Crown franchisees at their former BP locations, while others were granted first refusal rights. Crown franchises, as found by the trial judge, are significantly different than BP franchises, (App B at 22a, n.7)the most radical difference being a restriction on the franchisee's ability to transfer his franchise for its goodwill value.

[3] While all Petitioners alleged Maryland Act violations, only those Petitioners who had been franchisees at multiple locations continued to assert PMPA violations.

The case was decided by the District Court on Stipulated Facts and Cross-Motions for Summary Judgment. Following a hearing, the District Court granted partial summary judgment (as to liability) in favor of Petitioners on their claims under the Maryland Act. Relying on the decision of the United States Court of Appeals for the Second Circuit in *Bellmore v. Mobil Oil Corporation*, 783 F.2d 300 (2d Cir. 1986), a case involving a nearly identical Connecticut goodwill statute wherein BP's same arguments were raised by Mobil and rejected, the District Court found that the goodwill provision of the Maryland Act was not preempted by the PMPA. The District Court held that "[w]here provisions of state law do not conflict with the procedural and enforcement provisions of the PMPA, but provide supplemental terms governing the franchise relationship, they are held not to be preempted," (App. B at 22a-23a).

The District Court granted summary judgment to BP on Petitioners' PMPA claims. And, finding no just cause for delay under Rule 54(b), F.R.Civ.P., entered final judgment. An immediate appeal by BP was permitted by the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. 1292(b)[4] .

The Court of Appeals reversed. Rejecting *Bellmore*, failing to consider the decision of the First Circuit in *Esso Std. Oil Co. v. Dept. of Consumer Affairs*, 793 F.2d 43 (1st Cir. 1986), and disregarding significant qualifying language of PMPA's preemption provision, the Court of Appeals held that the provision mandated broad preemption and that the goodwill provision of the Maryland Act was thus invalid.

REASONS FOR GRANTING THE PETITION

Review by this Court is essential to resolve the conflict between the decision of the Court of Appeals below, and the decisions of the Courts of Appeals for the First, Second and Sixth Circuits relating to the proper scope of PMPA's preemption

[4] Although the Court of Appeals considered the issue, no cross-appeal was taken by Petitioners from that part of the District Court's decision granting BP summary judgment on the PMPA claims.

provision, 15 U.S.C. 2806(a). The Court of Appeals in this case, in deviating from its sister circuits, ignored express statutory language limiting the effect of the preemption provision and construed that provision in such a manner that, under the Court's Opinion, makes the preemption provision broader than the very scope of the Act itself. Such a construction, rather than furthering Congress' goal of protecting franchisees, frustrates such goal by subjecting state laws regulating various aspects of the petroleum franchise relationship, previously of unquestioned validity, to preemption. *See, CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987).[5] The confusion that exists, not only among the circuits, but also among the District Courts on the PMPA preemption issue, necessitates review and clarification by this Court.

A. Background of the PMPA.

In 1978, Congress enacted Title I of the PMPA to "remedy the extreme disparity of bargaining power between refiners and dealers", *Eden v. Texaco Refining and Marketing, Inc.*, 644 F.Supp. 1537, 1578 (D.Md. 1986), and to protect franchisees from "arbitrary or discriminatory termination or nonrenewal of their franchises."[6] *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 360 (4th Cir. 1986).

The legislative history indicates that the PMPA was designed to implement "a single, uniform set of rules governing the grounds for termination and nonrenewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise. . . ." S.Rep. No. 95-371, 95th Cong., 2d Sess. 15 (1978), U.S. Code Cong. & Admin. News, p. 877 (hereinafter "S.Rep."). As such, the PMPA "is directed first and foremost at the permissible *grounds* for termination or nonrenewal of franchises and at the *manner* in which such termination or nonrenewal is effected, or in other words, at the how and why of ending a franchise". *Lasko v. Consumers*

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[5] For example, state inventory repurchase laws, such as the Maryland Act, found at Md. Comm. Law Code Ann. 11-304(h) (1983 Repl.Vol.).

[6] This Court has yet to consider a case involving any aspect of the PMPA.

Petroleum of Conn., Inc., 547 F.Supp. 211, 216 (D.Conn. 1981) (emphasis in original)[7] An examination of the entire PMPA reveals that it applies to (1) the permissible grounds for terminating or nonrenewing a franchise (15 U.S.C. 2802); (2) the notice requirements applicable thereto (15 U.S.C. 2804); and, (3) the remedies applicable to a violation of the grounds and notice requirements (15 U.S.C. 2805).

To assure that PMPA accomplished its objective of uniformity related to the grounds for, and notification requirements of, franchise terminations and nonrenewals, Congress included the following preemption provision:

> "*To the extent that any provision of this title applies* to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no state or any political subdivision thereof may adopt, enforce or continue in effect any provision of any law or regulation (including any remedy or penalty *applicable to any violation thereof)* with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title." (emphasis added).

15 U.S.C. 2806(a).

The legislative history provides insight into the intended scope of this provision. There, it is stated that "[t]o the extent that the provisions of Title I do not apply to an aspect of the franchise relationship, state laws dealing with such aspects of the relationship are not preempted." S.Rep. at 900.

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[7] PMPA simply "mandates strict compliance with the notice rquirements it imposes on a terminating or nonrenewing franchisor, *see* 15 U.S.C. 2804, and prohibits a franchisor from terminating or refusing to renew a franchise, except for the reasons specified in the Act, *see* 15 U.S.C. 2802." *Eden v. Texaco Refining & Marketing, Inc.*, 644 F.Supp. at 1579.

B. Background of the Maryland Act.

Even prior to federal Congressional action, the Maryland General Assembly "made known its concern about the distribution and sale through marketing arrangements of petroleum products in [that] state", *Becker v. Crown Central Petroleum Corp.*, 26 Md.App. 596, 598, 340 A.2d 324, 326 (1975). The result was the Maryland Act, a statute designed "for the *regulation of marketing agreements* between gasoline distributors and gasoline dealers," *Id.* at 605, 330 (emphasis added). Unlike the PMPA, which deals with termination and nonrenewal, the Maryland Act is directed primarily to regulating the substantive contractual relations between dealers and distributors, to redress the "imbalance and unfairness that is found to exist". *Comptroller of the Treasury v. Crown Central Petroleum Corp.*, 52 Md.App. 581, 593, 451 A.2d 347, 352 (1982). [8] In furtherance of this goal, subsection (a) of Section 11-304 specifically provides that "[e]very marketing agreement is subject to the provisions of this section, whether or not expressly set forth in the agreement".

The subsection under consideration in this case is 11-304(i), which provides, in part:

> "(i) *Payment for Goodwill.* -- (1) . . . if without the written consent of the dealer, the distributor terminates, cancels or unreasonably refuses to renew the marketing agreement, the distributor shall pay to the dealer the full value of any business goodwill which the dealer enjoys at the time he is notified of the termination, cancellation or refusal to renew."

Md. Comm. Law Code Ann. 11-304(i)(1).

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[8] While the Maryland Act and PMPA deal with different aspects of the parties' relationship, both have as their goal the protection of franchisees from oppressive refiner practices. The Maryland Act accomplishes this objective through regulating various terms of the parties' marketing agreement, *See*, Md. Comm. Law Code Ann. 11-304(a) (purpose of the Act is "to define the relationship and responsibilities of the parties to certain agreements"); while the PMPA accomplishes its purpose by prohibiting nonrenewals and terminations except for grounds permitted under that Act.

The issue below was whether this goodwill provision was preempted by the PMPA.

C. The District Court Decision and Cases Applying Narrow Preemption.

The District Court applied the PMPA provision narrowly, and held that where state law provisions do not conflict with provisions of the PMPA, but instead "provide *supplemental terms governing the franchise relationship*," (App. B at 22a-23a) (emphasis added), they are not preempted. The Court found *Bellmore v. Mobil*, 783 F.2d 300 (2d. Cir. 1986) "directly on point" (App. B at 22a) and controlling.

In *Bellmore*, the dealer's franchise agreement was nonrenewed pursuant to PMPA, 15 U.S.C. 2802(b)(3)(A). Bellmore sued under PMPA, as well as under the Connecticut Gasoline Dealers Act, for monetary compensation for the fair market value of his franchise, including goodwill. [9] The nonrenewal was determined to be proper under PMPA; however, Bellmore was found entitled to goodwill damages under the State Act. On appeal, Mobil contended that the PMPA mandated broad preemption on all issues related to termination or nonrenewal of petroleum franchises, and that the Connecticut goodwill statute was thus preempted. The Second Circuit disagreed, stating:

> "The PMPA neither expressly nor impliedly preempts all state law relating to any aspect of the termination or nonrenewal of petroleum franchises. Rather, it

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[9] Connecticut's statute provides:

> "Upon termination [or nonrenewal] of any franchise for whatever cause . . . except voluntary relinquishment or abandonment of the franchise by the franchisee, the franchisor shall fairly compensate the franchisee . . . [for the] goodwill, if any . . . provided that compensation need not be made to the franchisee for goodwill if 1) the franchisee has been given one year's notice of nonrenewal and 2) the franchisor agrees in writing not to enforce any covenant which restrains the franchisee from competing with the franchisor, and . . . a franchisor may offset against amounts owed to a franchisee under this subsection any amount owed by such franchisee to the franchisor."

Conn. Gasoline Dealers Act, Conn. Gen. Stat. Sec. 42-133 l(b).

> preempts only state statutes as to grounds for, procedures for, and notification requirements with respect to termination or nonrenewal."

783 F.2d at 304.

Continuing, the Court recognized the limits of the power Congress intended to exercise in enacting PMPA, stating that:

> "[t]hose limits are explained in the Senate Report as a single, uniform set of rules governing the *grounds* for termination and nonrenewal of motor fuel marketing franchises and the *notice* which franchisors must provide franchisees prior to termination of a franchise or nonrewnewal of a franchise relationship." S.Rep., *supra* at 877 (emphasis added).

783 F.2d at 305.

As logically it would make no sense for Congress to have intended a preemption provision broader than the very purpose of the Act itself, the *Bellmore* court determined that "[b]eyond those limits [grounds and notice], state regulation may claim full approbation." *Id.*, citing *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F.Supp. 1008, 1017 (N.D.Ga. 1979), *aff'd sub nom.*, 644 F.2d 1030 (5th Cir.), *cert.den.*, 454 U.S. 932 (1981). Said the Court:

> "It would be contrary to the Congressional purpose for this court to read the statute expansively, beyond the intended limits of the PMPA and to find a conflict between state and federal law resulting in the preemption of a state statute in areas that Congress left to the control of the states."

783 F.2d at 305.

Accordingly, the Court held that:

> "The goodwill provision of the Connecticut Act upon which Mobil relies (for preemption) is not a state law applying to the grounds for, procedures for, or notice requirements of the termination or nonrenewal of petroleum franchises, and thus, is not 'the same as' the applicable provisions of the PMPA."

783 F.2d at 305.

The First Circuit has similarly recognized that the states remain free to regulate an "aspect" of the franchise relationship, without violating the PMPA's preemption provision. In *Esso Std. Oil Co. v. Dept. of Consumer Affairs*, 793 F.2d 431 (lst Cir. 1986), the Court considered a preemption challenge to a Puerto Rico regulation providing for the regulation of rents that lessors of gasoline stations could charge their lessees. The regulation required the parties to negotiate rent, and if they were unable to agree, provided a procedure for a rent control board to set such amount. Esso contended that the regulation was preempted because under PMPA, it could demand any rent that it wished, as a predicate to the renewal of the franchise. The regulation, Esso argued, restricted the maximum rents franchisors could charge, and *a fortiori*, affected the franchisor's ability to nonrenew. In explaining this issue, and the preemptive scope of PMPA, the Court stated:

> "The question presented by this case is whether the balance struck by the PMPA in the area of termination and nonrenewal also impliedly gives franchisors a substantive right to be free of state regulation of all elements of the franchise agreement. We do not believe it gives such protection."

793 F.2d at 434.

The Court deemed significant the fact that even with the rent control regulation, the franchisor remained free to terminate or not renew a franchise "if it did not wish to accept the rent established by [the regulatory board]." *Id.* Finding that the regulation, rather than governing terminations or nonrenewals, controlled a "substantive element of the franchise agreement," *Id.* at 434-35, the Court looked to the legislative history and stated:

> "There is no indication from either the language of the PMPA or its legislative history that Congress intended to preempt all state regulation of specific components of the franchise agreement, including rent. Indeed, the discussion in the House of Representatives prior to passage of the PMPA reflects an emphasis on protect-

> ing the rights of powerless franchisees, and it would have been contrary to that primary objective of the PMPA for Congress to have desired that the bill actually reduce protection for franchisees by preempting all substantive state regulation. *See* 123 Cong.Rec. H10383-88 (daily ed., April 5, 1977)."

Id. at 435.

In upholding the validity of the regulation, and affirming the judgment of the District Court, it was concluded:

> "In sum, the Commonwealth's rent control regulation legitimately governs a substantive element of franchise agreements. It remains clear of the preemptive scope of the PMPA by allowing franchisors to continue to terminate and refuse to renew franchises on the specific grounds allowed by the PMPA."

Id. at 436.

See also, Consumer's Petroleum Co. v. Texaco, Inc., 804 F.2d 907, 915 (6th Cir. 1986) (citing *Bellmore* with approval, the Court noted that the "PMPA does not preempt every state law that relates remotely to the termination or nonrenewal of petroleum franchises").

As in *Bellmore* and *Esso Std.*, the present case presents a state statute regulating a "substantive element" or "aspect" of the franchise relationship. The Maryland Act, like the Puerto Rico regulation in *Esso Std.*, and the Connecticut Act in *Bellmore*, in no way affects a franchisor's ability to terminate or nonrenew a franchise relationship for a reason valid under PMPA. What the statute does is merely direct that under limited circumstances, and as a term of the parties' franchise agreement, goodwill shall be recognized. The franchisor is free to terminate, as provided under PMPA, but the goodwill of the dealer vis-a-vis the terminating marketer must be recognized. As the Maryland Act is not a "state law applying to the grounds for, procedures for, or notice requirements of the termination, . . . [it] is not 'the same as' the applicable provisions of the PMPA," *Bellmore*, 783 F.2d at 705, and is thus not preempted under the plain language of PMPA's preemption

provision. As the Court of Appeals, however, held to the contrary, review by this Court is necessary.

D. The Decision of the Court of Appeals.

The holding of the Court of Appeals below, finding the Maryland Act preempted, cannot be reconciled with the *Bellmore* and *Esso Std.* decisions. In reaching its preemption conclusion in this case, the Court of Appeals emphasized the "with respect to" termination language in 15 U.S.C. 2806(a) (App. A at 13a, n.1), as well as the "dealing with" termination language found in one sentence of the Senate Report at p. 901 (App. A at 13a). From this, the Court concluded that "[t]he breadth of such language in our opinion evinces an intent by Congress to 'occupy the field relating to termination and nonrenewal of petroleum franchises'", quoting *Tousley v. North Am. Van Lines*, 752 F.2d 96, 101 (4th Cir. 1985). (App A at 12a) In so concluding, the Court ignored the first ten words of the preemption provision, which state that "[t]o the extent that any provision of this title applies . . . ." Title I of the PMPA applies *only* to grounds for termination/nonrenewal and the notice requirements applicable thereto -- not to *any* matters "respecting" termination/nonrenewal.[10] Moreover, the one sentence from the Senate Report seized upon by the Court to support its rationale (App.A at 12a) was taken out of context. The sentence in question, stating that "[t]he preemption provisions of the legislation are limited to provisions of state law *dealing with* termination or nonrenewal," actually introduces a paragraph discussing 15 U.S.C. 2806(*b*), dealing with the states' authority to regulate assignments. *See*, S.Rep. p. 901. The sentence, taken out of context by the Court of Appeals, actually supports the argument in

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[10] The Court's Opinion mistakenly substitutes "subchapter" for "title". *See* App. A at 8a ; 15 U.S.C. 2806(a). Other errors are more consequential. For example, the Court incorrectly applies legislative history applicable to Maryland's refiner divorcement law, Md. Ann. Code Art. 56, Section 157E, to the Maryland Gasohol and Gasoline Products Marketing Act, Md. Comm. Law Code Ann. 11-301, *et seq.*, citing *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 418-22, 370 A.2d 1102, 1108-10 (1977), as authority without noting that this Court affirmed that decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), *reh.den.*, 99 S.Ct. 232, 58 L.Ed.2d 100. (App. A at 6a-7a)

favor of *narrow* preemption. In short, the analysis offered by the Court to support its broad preemption conclusion is flawed, and contrary to the express terms of the statute.

The Court itself recognized that if it read the statute as did the Second Circuit in *Bellmore* and the Sixth Circuit in *Consumer's Petroleum*, [11] the Maryland Act might be spared from preemption (App. A at 12a-13a, n.l). Had the Court considered the qualifying introductory language of Section 2806(a), an interpretation consistent with that of the other Circuits would have been required.

Finally, it should be noted that while the Court of Appeals made efforts to distinguish *Bellmore*, those efforts represent distinctions without a difference, and distinctions which are, in any event, entirely irrelevant to a preemption analysis. First, while it is true that this case involves a termination based on a market withdrawal, permitted under 15 U.S.C. 2802(b)(2)(E), *Bellmore* involved a nonrenewal for "failure to agree", under 15 U.S.C 2802(b)(3)(A). The significant fact is that both cases involve a termination/nonrenewal *lawful* under PMPA. Secondly, while the Court says that *Bellmore* did not adequately consider the interests of franchisor "flexibility", the Court in no way suggested, nor is it understood, how this factor is relevant to a preemption analysis. Third, the Court says that any goodwill payment in this case is more in the nature of a penalty. *Bellmore* expressly rejected this argument, 783 F.2d at 305, which argument has no more applicability here than in that case. Any preempted "penalty" under the express terms of the PMPA provision, 15 U.S.C. 2806(a), is only applicable to a "violation" of the grounds/notice requirements. [12] No such violation was claimed here. Moreover, here, as in *Bellmore*, the goodwill payment is not a penalty, as the franchisor is liable for the payment upon *any* termination if it is without the dealer's consent and is not the result of dealer misconduct. 785 F.2d at 305. Finally, the fact that some of the Petitioners became Crown franchisees is irrelevant to a preemption analysis and does not distinguish *Bellmore*. While in that case the dealer was without

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[11] The Court did not even consider the First Circuit's opinion in *Esso Std.*

[12] The preemption provision states in part that it applies to "any remedy or penalty applicable to any *violation* thereof". 15 U.S.C. 2806(a) (emphasis added).

a franchise, here the dealers found themselves with franchises much different, and more onerous, than they had before. *See*, App. B at 22a,n. 7; fn.2, *supra*. Accordingly, the Court of Appeals' efforts to distinguish *Bellmore* are unpersuasive in general, and irrelevant in particular, as applied to a preemption analysis.

E. Preemption is not Mandated under this Court's Preemption Decisions, and the Court of Appeals' Decision Conflicts with those Decisions.

This Court has stated that it is not to be lightly presumed that Congress intended to displace state law, *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981), and that preemption should not be found unless that was Congress' "clear and manifest purpose." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. , 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988), and cases cited. The objective is always "to ascertain the intent of Congress". *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 689, 93 L.Ed.2d 613, 623 (1987).

In a case such as the present, where Congress has expressed an intent *not* to completely displace state regulation,

> "[f]ederal law may nonetheless preempt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because compliance with both federal and state regulations is a physical impossibility, . . . or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

Id.

No actual conflict exists between the goodwill provision of the Maryland Act and the PMPA. One regulates a term of the marketing agreement, while the other regulates the grounds and notice requirements for termination/nonrenewal. Moreover, compliance with both is not physically impossible, as under PMPA, BP was free to terminate the franchises and withdraw from the market, while at the same time complying with the Maryland Act. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257, 104 S.Ct.

615, 626, 78 L.Ed.2d 443 (1984) (This Court found that paying both federal fines and state-imposed punitive damages not physically impossible). BP can easily comply with both statutory requirements. Moreover, the state law is not an obstacle to the Federal legislation, as it involves an area, *i.e.*, regulation of an aspect of the marketing agreement, that is not involved in the Federal legislation, and serves a purpose consistent with such legislation. Accordingly, analyzed under this Court's preemption guidelines, the goodwill provision of the Maryland Act survives.

Rather than applying the above analysis, the Court of Appeals, disregarding the very language of the preemption provision which evinces an intent *not* to occupy the entire field, found that Congress intended broad preemption on any issue "dealing with" or "with respect to" (App. A at 12a), termination/nonrenewal. Had the Court applied a proper analysis under this Court's decisions, a contrary conclusion would have been mandated.

F. Review is Necessary Because of Confusion Among the District Courts Regarding the Scope of PMPA Preemption.

Finally, review by this Court is necessary to settle the confusion among the District Courts over the proper scope of PMPA preemption. In *Atkins v. Chevron USA, Inc.*, 672 F.Supp. 1373 (D.Wash. 1987), wherein the Court found a Washington state franchise act claim to be preempted by PMPA, the Court noted that "other jurisdictions have split widely on the preemptive effect of Section 2806(a)", 672 F.Supp. at 1378. An examination of the cases supports the *Atkins*' Court's observation.

In *Exxon v. Georgia Ass'n of Petroleum Retailers, supra*, the Court held that a Georgia hours of operation law was not preempted. In *Darling v. Mobil Oil Corp.*, _F.2d_(2d Cir. 1989) (No. 1296, Decided Jan. 4, 1989), the Court, considering a similar Connecticut statute, found it to be preempted. In *Eden v. Texaco Refining and Marketing, Inc.*, 644 F.Supp. 1573 (D.Md. 1986), the Court found a Maryland hours of operation statute not preempted, while in *Vasco v. Mobil Oil Corp.*, 698 F.Supp. 102 (D.Md. 1988), the identical Maryland statute was deemed preempted. In *L.C.*

Williams v. Exxon Co., USA, 627 F.Supp. 864 (M.D.N.C. 1985), the Court held that common law claims and state unfair trade practices act claims were not preempted. Yet, in *Continental Enterprises v. American Oil Co.*, 808 F.2d 24 (8th Cir. 1986), and *Sieko v. Amerada Hess Corp.*, 569 F.Supp. 768 (E.D.Pa. 1983), the Courts held that breach of contract/ misrepresentation and breach of fiduciary duty claims were preempted. *But see, Lasko v. Consumers Petroleum of Conn., Inc.*, 547 F.Supp. 211 (D.Conn. 1981) (State law prescribing minimum franchise terms not preempted).

Under the present state of the lower court opinions, no clear direction exists concerning the proper scope of the PMPA preemption provision. District Judges are left to pick and choose between those cases applying narrow preemption, and those favoring broad preemption. Ultimately, this Court must make the final determination of which approach is correct. Given the present opportunity in a case squarely at odds with two other circuits, this Court should issue a writ of certiorari and decide this important issue.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari be granted.

Respectfully submitted,

By:_____

HARRY C. STORM
Counsel of Record

Attorney for Francisco S. Jiminez, et al.

February, 1989

APPENDIX A

OPINION AND ORDER OF THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3843(L)

Francisco S. Jimenez,

Plaintiff-Appellee,

versus

BP Oil, Inc.,

Defendant-Appellant.

No. 87-3854

James Palmer; Torsak Rossaki; French Ray; Leon Uzarowski; Anton A. Bond; Farzin Afsahi; Ojan Fakhriyazdi; Firouz Rezazedeh; Sam Akindura; Edward Parlier; Luiz Azucena; Lalith Gnanasiri; Yoav Portnoy; Boo H. Chung; Jeffrey H. Kormann,

Plaintiffs-Appellees,

BP Oil, Inc.,

Defendant-Appellant.

No. 87-3855

Carlos Horcasitas,

Plaintiff-Appellee,

BP Oil, Inc.,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-86-785, CA-86-1007, CA-86-818).

Argued: April 7, 1988 Decided: August 8, 1988

Before WIDENER, and CHAPMAN, Circuit Judges, and MICHAEL, District Judge for the Western District of Virginia, sitting by designation only.

John Henry Lewin, Jr. (Arthur W. Machen, Jr., VENABLE, BAETJER & HOWARD on brief) for Appellant. Harry Carl Storm (ABRAMS, WEST & STORM, P.C. on brief) for Appellees.

CHAPMAN, Circuit Judge:

This case involves the nonrenewal of a petroleum retailing franchise. The district court, 652 F.Supp. 329 (D.Md. 1987), ruled that defendant BP Oil Company (BP) was liable to its franchisee-retailer, Francisco Jimenez, for goodwill payments, construing the nonrenewal as a "termination" under the Maryland Gasohol and Gasoline Products Marketing Act ("the Act" or "the Maryland Act"), Md. Comm. Law Code Ann. ll-301 to -308 (1983). It also ruled that the Federal Petroleum Marketing Practices Act (PMPA), 15 U.S.C. 2801 *et seq.* (1982) does not preempt the Maryland Act. Although the district court said BP had not violated the PMPA, it did find that its nonrenewal of the Jimenez franchise was a termination under the Act, entitling Jimenez to payment for goodwill. The court thus granted summary judgment to appellees on their claim for payments under the Act, but found for appellant BP on the issue of liability under the PMPA. We find that the PMPA preempted the Maryland Act under the facts of the instant case, we reverse.

I

Plaintiffs Jimenez, Horcasitas, and Palmer were multistation BP franchisees who operated in the Baltimore- Washington area pursuant to three-year franchise agreements. The franchises were scheduled to expire on April 30, 1985. For some time BP had been rethinking its decision to distribute petroleum products in that area. On April 18, 1985, it notified its plaintiffs that it would extend their franchises to October 31, 1985, and it would then determine whether it would remain in the local market and drop some less profitable distributorships, or whether it would completely exit the market. In September 1985 BP entered an agreement with Crown Central Petroleum Corporation ("Crown") by which Crown would purchase all of BP's Baltimore-Washington retail stations as of April 1, 1986. BP notified its franchisees of this agreement by letter dated October 17, 1985. BP then extended its franchises with plaintiffs through April 1, 1986, eleven months beyond the initially scheduled franchise expiration date.

Crown offered current BP franchisees franchises with terms less favorable than the BP franchise: particularly, Crown's prohibition of its franchisees operating more than one station. As a result, some of the BP franchisees, including plaintiffs, rejected offers of Crown franchises.

As planned, BP withdrew from the Baltimore-Washington market, and the Crown franchises with some of the former BP station owners became effective April 1, 1986. The plaintiffs brought an action on March 26, 1986 seeking a temporary injunction to prevent the termination of their BP franchises. They asserted that BP willfully violated the PMPA, and they sought goodwill payments under the Maryland Act. The United States District Court for the District of Maryland denied such relief.

Plaintiffs amended their complaint on July 18, 1986 and alleged that BP violated the PMPA, 15 U.S.C. 2802(b)(2)(E)(iii)(II), which provides that when a franchisor sells his interest in marketing premises, the purchaser must offer a franchise with terms and conditions "which are not discriminatory to the franchisee as compared to franchises then currently being offered" by the purchaser of seller's franchises. Plaintiffs reiterated their claim under the Maryland Act for goodwill payments as a result of the termination of their franchises.

The district court granted summary judgment for BP on the claims under the PMPA. It determined that the terms offered by Crown were nondiscriminatory and that BP's decision to exit the market was a "good faith" economic reason for termination or nonrenewal of their franchises. *See* 15 U.S.C. 2802(b)(2)(E).

The district court found for plaintiffs on their claims for goodwill under the Maryland Act. It found that the PMPA did not preempt the Maryland Act because the provisions of the state law as to goodwill payments upon franchise termination were not inconsistent with PMPA but were supplemental thereto. The court held that the instant case involved a termination rather than a "reasonable nonrenewal" for purposes of the Act and that plaintiffs were entitled to goodwill under the Maryland statute.

BP appeals. Its threshold argument is that the Act was intended to address wrongful conduct - unreasonable nonrenewals

and terminations - rather than the instant situation: a complete withdrawal by an oil distributor from a geographic market. It also argues that, the Federal PMPA preempts the Act's provision requiring goodwill payments for cancellation, termination, or unreasonable nonrenewal of retailing franchises. In the alternative, it argues that if goodwill payments are necessary, the Act's failure to establish a method for valuating goodwill gives the parties the ability to do so through their franchise agreement.

II

A. Applicability of the Maryland Act

It is well established that a court should avoid deciding a constitutional question when it can dispose of a case on another basis. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Thus, before we decide BP's preemption claims under the Supremacy Clause, we must decide whether the district court properly found the Maryland Act applicable to the present facts. Turning to the Maryland statute, we think it unclear whether the Act covers complete market withdrawal as was accomplished by BP in the Baltimore-Washington area.

The Maryland statute seeks to prevent oil producers and refiners from forcing an independent retailer, who leases his station, to choose between either submitting to terms imposed by the company or losing his franchise. The effect of such maneuvering had been the vertical integration of producers into the retailing business. This, in turn, resulted in decreased competition, since there were fewer independent retailers to engage in price competition with company-operated stations. The Maryland Act was intended to remedy onerous supplier practices and price discrimination aimed at forcing independent retailers into a desired pricing line. *See generally Governor of Md. v. Exxon Corp.*, 279 Md. 410, 418-22, 370 A.2d 1102, 1108-10 (1977); Comment, *Gasoline Marketing Practices and "Meeting Competition" Under the Robinson-Patman Act: Maryland's Response to Direct Retail Marketing by Oil Companies*, 37 Md.L.Rev. 323, 323-27 (1977).

The goodwill payment requirement of the Act, Md. Comm. Law Code Ann. ll-304(i), serves this purpose only when a producer seeks to force its way into the retailing market. BP is not seeking to capitalize on goodwill established by its independent retailers. There has been merely a substitution of franchisors - Crown for BP. Thus, we initially question whether the Maryland Act intended to operate as a "toll" to be paid by distributors seeking to exit a geographic market.

B. Preemption of Maryland Law

Given the paucity of Maryland statutory or common law on whether the Maryland Act applies to market withdrawals, we will assume here that the Maryland legislature intended such. We thus move to the central issue: Whether the Maryland goodwill payment provision is preempted by the PMPA. We find that it is, at least insofar as it applies to complete market withdrawals.

The PMPA was enacted in 1978 in part to establish minimum federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel. S.Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 873 [hereinafter S. Rep.]. The main purpose of the safeguards of the PMPA was to combat termination and nonrenewal, or threats of termination and nonrenewal, that had been used by franchisors to compel franchisees to comply with marketing policies of the franchisor. S. Rep., *supra*, 1978 U.S. Code Cong. & Admin. News at 876. The Senate Report stated to this effect:

> Needed is a single, uniform set of rules governing the grounds for termination and nonrenewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or nonrenewal of a franchise relationship. Such a set of rules would clearly define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or nonrenewal of the franchise relationship.

S. Rep., *supra*, 1978 U.S. Code Cong. & Admin. News at 877.

The PMPA provides for preemption of certain state laws governing the same subject matter:

> (a) To the extent that any provision of this subchapter applies to the termination (or furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

15 U.S.C. 2806(a). The Maryland Act, on the other hand, provides in part as follows:

> (i) Payment for goodwill. - (1) In addition to the provisions of subsection (h) of this section [requiring repurchase of products by distributor from terminated or cancelled franchisees], if, without the written consent of the dealer, the distributor terminates, cancels or unreasonably refuses to renew the marketing agreement, the distributor shall pay the dealer the full value of any business goodwill which the dealer enjoys at the time he is notified of the termination, cancellation or refusal to renew.
>
> (2) The distributors shall make the payment required by the subsection within 30 days from the effective date of the termination, cancellation or refusal to renew.
>
> (3) This subsection does not apply if the dealer materially breaches the marketing agreement.

Md. Comm. Law Code Ann. ll-304(i).

Initially, we note that this court should be reluctant to determine that state law has been preempted by federal legislation, since "'[t]he exercise of federal supremacy is not lightly to be presumed.'" *Tousley v. North Am. Van Lines*, 752 F.2d 96, 101 (4th Cir. 1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Preemption of state law may be accomplished in several ways. As stated succinctly by the Supreme Court in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986):

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law. Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Id. at 368-69 (citations omitted). The central inquiry is whether Congress intended that federal regulation supercede state law with respect to the regulated subject matter. *See id.* at 369. BP asserts that Congress intended to supplant all state law and regulations governing the termination or nonrenewal of petroleum marketing franchises.

Jimenez argues that language from this court's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986) supports its contention that no preemption of state laws regarding the "effects" - *i.e.*, payment of goodwill -- upon termination or nonrenewal of petroleum franchises was intended. Rather, it emphasizes that Congress' objective in enacting the PMPA was to establish "'a single, uniform set of rules governing the *grounds* for termination and nonrenewal of motor fuel marketing franchises.'" 795 F.2d at 364 (quoting S. Rep., *supra*, 1978 U.S. Code Cong. & Admin. News at 877) (emphasis added). We find this grounds/effects distinction

unpersuasive in the present context and therefore conclude that the PMPA preempts Maryland's goodwill payment requirements in the instant case.

The Second Circuit utilized this grounds/effects distinction in *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300 (2d Cir. 1986), in finding that the PMPA did not preempt a similar goodwill payment provision in the Connecticut Gasoline Dealer's Act. In *Bellmore*, a plaintiff-franchisee declined a franchise renewal proposal by defendant-franchisor Mobil that nearly doubled his monthly rent for the franchise premises. Mobil thereafter informed Bellmore that his franchise would not be renewed. Bellmore then sought declaratory and injunctive relief under the PMPA, asserting violations of that Act in that Mobil's proposals were made neither in good faith nor in the normal course of business. 783 F.2d at 303. After such relief was denied, Bellmore amended his complaint to include a claim for the fair market value of his franchise, including goodwill, under the Connecticut Gasoline Dealer's Act, Conn. Gen. Stat. 42-133l(b). A jury awarded Bellmore $43,000 on his claims for goodwill under the Connecticut Act. Mobil appealed, contending the PMPA preempted the Connecticut Act on all issues related to the termination or nonrenewal of petroleum franchises. The Second Circuit affirmed, finding no preemption had been effected by the passsage of the Connecticut Act. The court stated in part:

> We cannot accept Mobil's argument that the payment of goodwill is a remedy or penalty for termination and thus preempted as not the same as the applicable provisions of the PMPA. The goodwill portion of the Connecticut Act is no more than a recognition of the goodwill value that Mobil would otherwise receive because of the efforts of the deposed franchisee. This payment of goodwill is not a penalty, as Mobil asserts, because Mobil is liable for the payment of such goodwill upon termination or nonrenewal "for whatever cause or reason except voluntary relinquishment or abandonment."

783 F.2d at 305 (quoting Conn. Gen. Stat. 42-133l(b)).

We find *Bellmore* unpersuasive here for four reasons. First, on its facts *Bellmore* did not involve a market withdrawal as was effected by BP in the instant case. Thus, the goodwill payment sought in the instant case may be more readily characterized as a penalty than could the payments sought in *Bellmore*.

Second, the *Bellmore* court, while emphasizing the need to protect franchisees against onerous producer practices, trivialized "the legitimate needs of a franchisor to be able to terminate a franchise or not renew a franchise relationship based . . . upon certain changes in circumstances." S.Rep., *supra*, 1978 U.S. Code Cong. & Admin. News at 877. The Senate Committee stated, "Particularly important is that legislation dealing with this subject recognize the importance of adequate flexibility so franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.*

Third, *Bellmore*'s rationale is unpersuasive since it does not address the failure of the Connecticut Act (or the Maryland Act in this case) to take into account market withdrawals by franchisors. The PMPA, both in its legislative history, quoted above, and in its express provisions acknowledges the potential need for a franchisor to withdraw from a geographic market area and does not penalize it for doing so. *See* 15 U.S.C. 2802(b)(2)(E) (allowing withdrawal of franchisor from relevant geographic market area if done (i) in good faith and (ii) in the normal course of business); *see also* S. Rep., *supra*, 1978 U.S. Code Cong. & Admin. News at 891-93. Neither the Maryland Act nor the Connecticut Act recognize any special circumstance if the termination or nonrenewal is based upon a market withdrawal. Since market withdrawals without penalty are envisioned under the federal scheme, we find the Maryland provision, which in effect penalizes BP here in its attempt to withdraw from the Baltimore-Washington market, is preempted inasmuch as it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Last, unlike *Bellmore*, Jimenez and his fellow claimants are not "deposed franchisee[s]." *Bellmore*, 783 F.2d at 305. Here,

Jimenez, *et al.*, have been offered franchises with BP's successor Crown. Plaintiffs were offered a franchise at one location in accordance with Crown's policy of allowing its franchisees to operate only at one location. In addition, plaintiffs were offered the right to purchase the other locations they had operated. There has been no "deprivation" of goodwill by BP. Since BP is withdrawing from the area, it will not take with it nor benefit from any goodwill that plaintiffs may have developed. Any such goodwill remains with the plaintiff-franchisees. Further, this case does not involve the kind of attempts to compel franchisees to comply with onerous marketing policies established by franchisors as both the PMPA and the Maryland Act attempt to redress. *See* S. Rep. *supra*, 1978 U.S. Code Cong. & Admin. News at 876; Comment, *supra*, at 323-27.

In conclusion, both the statute and its legislative history address the preemptive effect of the PMPA. Section 2806(a) provides, "to the extent that any provision of this subchapter applies to the termination . . . of any franchise, or to the nonrenewal . . . of any franchise relationship, no State or any political subdivision thereof may adopt, enforce or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) *with respect to* termination . . . of any such franchise or to the nonrenewal . . . of any such franchise relationship unless such provision of such law is the same as the applicable provision of this subchapter." 15 U.S.C. 2806(a) (emphasis added). Similarly, the Senate Report provides, "The premption provisions of the legislation are limited to provisions of State law *dealing with* termination or nonrenewal of franchise relationships." S.Rep., *supra*, 1978 U.S. Code Cong. & Admin. News at 901 (emphasis added). The breadth of such language in our opinion evinces an intent by Congress to "occupy the field relating to termination and nonrenewal of petroleum franchises." *See Tousley v. North Am. Van Lines*, *supra*, at 101.[1]

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[1] Some courts have looked to *Bellmore* and its interpretation of the PMPA's preemptive power as extending only "to grounds for, procedures for, and notification requirements with respect to termination of nonrenewal." *Bellmore*, 783 F.2d at 304; *accord Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907, 915 (6th

We therefore conclude that plaintiffs are not entitled to payment by BP for accumulated goodwill, because the Maryland Act provisions requiring such payment are preempted by the PMPA. We agree, however, with the district court's conclusion that BP did not violate the PMPA, particularly 15 U.S.C. 2802(b)(2)(E), in withdrawing from the Baltimore-Washington market.

AFFIRMED IN PART;
REVERSED IN PART.

Cir. 1986); *Mobil Oil Corp. v. Karbowski*, 667 F.Supp. 927, 933 (D. Conn. 1987). Arguably, if this court reads the preemption section of the PMPA as narrowly as those courts did, Jimenez might be correct in arguing that the goodwill payment provision of the Maryland Act might be spared from preemption since it does not govern the "grounds", "procedures" or "notification requirements" for termination. However, a literal reading of the PMPA, as noted above, reveals that it preempts "any provision of any [state] law or regulation (including any remedy or penalty applicable to any violation thereof) *with respect to termination*." 15 U.S.C. 2806(a). This language is expressly broader than is the judicial gloss applied by *Bellmore* and courts following that decision. The statute, therefore, allows preemption under the instant facts. *Cf. Atkins v. Chevron USA, Inc.*, 672 F.Supp. 1373, 1378-79 (W.D. Wash. 1987) (preempting goodwill payment provision under Washington's Franchise Investment Protection Act after determining that the provision was "inconsistent with the terms and purposes of the PMPA").

APPENDIX B

OPINION AND ORDER OF THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANCISCO S. JIMENEZ	*	
	*	
v.	*	Civil No. JFM-86-785
	:	
BP OIL, Inc.	*	
	*********	
CARLOS HORCASITAS	*	
	*	
v.	*	Civil No. JFM-86-813
	*	
BP OIL, INC.	*	
	*********	
JAMES G. PALMER, et al.	*	
	*	
v.	*	Civil No. JFM-86-1007
	*	
BP OIL, INC.	*	
	*********	

MEMORANDUM

Plaintiffs are former franchisees of B.P. Oil, Inc. who operated retail service stations for BP before BP withdrew from the Baltimore-Washington market in April 1986. Plaintiffs allege (1) that BP's termination of the franchises was in violation of section 2802(b)(2)(E) of the Petroleum Marketing Practices Act ("PMPA"), and (2) that BP is liable to them under section 11-304(i) of the Maryland Gasohol and Gasoline Products Marketing Act ("The Maryland Act") for the value of any business goodwill which they enjoyed at the time that they were notified of the termination of their franchises.[1] The parties have cross-moved for summary judgment on both of these claims.

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[1] Plaintiffs initially filed this action before BP had withdrawn from the market and sought a temporary injunction against the termination of their franchises. On March 28, 1986 this Court denied that motion. Crown Central Petroleum Corp., to which BP transferred its interests in retail service stations in Maryland, was originally named as a defendant but has now been voluntarily dismissed.

FACTS

From 1979 to 1985, gasoline pumped annually at nearly all BP area stations had been continually decreasing. As a result, in 1985, BP decided that either a market withdrawal or restructuring of the operation of its retail service stations in the Baltimore-Washington area was necessary. On April 18, 1985, BP sent letters to each of its dealers in the area telling them of the situation.

Dealers received one of two types of letters. Both letters told the recipient that BP intended to either restructure its operations, which would involve selling half the stations, or to withdraw from the market completely by selling its interest in all of the area stations to another oil company. Beyond those comments, the content of the two types of letters differed.

If the dealer owned a franchise that BP would keep under a market restructuring plan, the dealer received a "keeper" letter. The letter explained that the dealer would be offered a new BP dealer agreement if a marketing restructuring plan was adopted. The dealer was also told that if BP withdrew from the market its BP franchise would be terminated on October 31, 1985 and the dealer would be offered a non-discriminatory franchise by the oil company purchasing BP's interest. The dealer was told that he would be informed of the status of BP's plans within the next 180 days.

If the franchise was one BP determined was undesirable to keep, the dealer received a "non-keeper" letter. This letter explained that regardless of what plan BP adopted, the franchise would be terminated on October 31, 1985. The dealer was told that he would either be offered a non-discriminatory franchise by the oil company purchasing BP's interest or be offered an opportunity to purchase the station operated by the dealer. The dealer was told that he would be informed which alternative applied to him within the next 180 days.

On September 26, 1985, BP signed a letter of intent to sell all of its Baltimore-Washington area retail stations to Crown Central Petroleum Corp. The closing date was set as January 31, 1986. BP notified the dealers of the agreement with Crown by letter dated

October 17, 1985. That letter also indicated that the termination of the BP franchise agreements was postponed to the closing date. The letter further said that if the Crown deal did not go through, BP would go ahead with its restructuring plan, keeping certain franchises and selling others to the franchisees, as previously indicated by the keeper and non-keeper letters.

On December 23, 1985, Crown sent a letter to each of the BP dealers. Again, several types of letters were sent out. Certain dealers were notified that they would be offered a nondiscriminatory franchise. Other dealers were notified that they would be offered the right to purchase the station they were operating. Several dealers operated more than one franchise. These "multi-station" dealers were notified that Crown would offer a nondiscriminatory franchise to them at only one location selected by Crown and that they would be offered the right to purchase the other locations they operated that were not selected. This offer was a result of Crown's corporate policy of not allowing its franchise owners to operate more than one station.

Certain of the dealers accepted the offers made by Crown and others rejected them. BP's withdrawal from the market and Crown's franchises with the former BP station operators became effective April 1, 1986.

DISCUSSION

PMPA Claim

The PMPA claim is brought by four multi-station franchisees (Ray, Uzarowski, Chung and Jimenez) who refused the franchise offer made to them by Crown. The focus of their contention is that this offer was untimely made under 15 U.S.C. 2802(b)(2)(E) and that BP's termination of their franchises was therefore unlawful. Section 2802(b)(2)(E) provides as follows:

> (E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the

franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if --...

(iii) in the case of leased market premises --

(1) the franchisor, during the 180 day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer or assign to the franchisee such franchisor's interest in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(11) in the case of the sale, transfer or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such person or franchises then in effect and with respect to which such other person is the franchisor.

Plaintiffs argue that under subsection (E)(iii)(l) an offer to purchase a station must be made within 180 days after the notice of termination is given under 15 U.S.C. 2804. Thus, plaintiffs argue, Crown's offer to purchase was too late since it was made by Crown's letter of December 23, 1985, almost 250 days after BP's initial letter of April 18, 1985, giving notice of termination.[2]

Plaintiffs contend that in enacting section 2802(b)(2)(E)(iii), Congress carefully distinguished between offers to purchase and

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[2] Plaintiffs do not allege that the April 18, 1985 notice was itself in any way untimely.

offers of a non-discriminatory franchise. As to offers to purchase, Congress required the offer to be made within 180 days of the notice of termination under subsection (iii)(I); Congress imposed no such time limitation for offers of non-discriminatory franchises under subsection (iii)(II). Plaintiffs vaguely argue that Congress may have drawn this distinction in order to assure that the franchisee "will not suffer continued uncertainty when a market withdrawal is involved." However, plaintiffs assert no concrete basis for the distinction and their argument is little more than chimerical. They cite nothing in the legislative history to show that this was Congress' intent. Moreover, it certainly is not self-evident that it is generally in the interest of franchisees to have the franchisor forced into a situation where it must have its successor offer non-discriminatory franchises rather than offer to sell stations where the franchisees had been operating. Likewise, it should not be presumed that Congress had the unrealistic expectation that major market withdrawals which, as the present case demonstrates, necessarily involve financial and legal complexities, can be effected within a six month period.[3]

Rather than try to glean from the statutory language a distinction and imagined reasons for that distinction which is supported neither *a priori* nor by the legislative history, it is preferable to acknowledge the simple fact that subsection (iii) is badly drafted. It seems plain that the time period Congress meant to impose when it referred to the "180 day period after notification was given pursuant to section 2804 of this title" was "the *more than* 180-day period after notification was given pursuant to section 2804 of this title." All that Congress was trying to do was to describe the sequence in which offers to purchase and offers of non-dis-

---

[3] The premises to plaintiffs' argument that subsection (iii)(I) but not subsection (iii)(II) imposes a 180 day limitation is itself suspect. The phrase "the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title" does not appear only in subsection (iii)(I) and not in subsection (iii)(II). However, in order for subsection (iii)(II) to make any sense, this phrase must be read into it; otherwise there would be no subject or verb in subsection (iii)(II). It is thus evident that Congress intended the subject phrase (including the 180 day time period) to appear in the introductory clause to subsection (iii) and be applicable to both subsections.

criminatory franchises were to be given. If it had meant to mandate that the offer be made within 180 days, it would have expressly said so, or, at least, have omitted the word "the" before the words "180 day period".[4] As written, it is clear that the phrase is merely meant to paraphrase what section 2804 says, not to mandate a new deadline.

Claims for Goodwill Under the Maryland Act

All plaintiffs claim an entitlement to goodwill under the Maryland Act. There are four different types of stations as to which goodwill is claimed: (1) stations as to which an offer to purchase was made by Crown and accepted by the franchisee; (2) stations as to which an offer to purchase was made by Crown and rejected by the franchisee; (3) stations as to which an offer of a franchise was made by Crown and accepted by the franchisee; and (4) stations as to which a franchise offer was made by Crown which was rejected by the franchisee.

The relevant section of the Maryland Act provides as follows:

> (a) *In general.*-- Every marketing agreement is subject to the provisions of this section, whether or not expressly set forth in the agreement. . . .
>
> (i) *Payment for goodwill.*-- (1) In addition to the provisions of subsection (h) of this section, if, without written consent of the dealer, the distributor terminates, cancels or unreasonably refuses to renew the marketing agreement, the distributor shall pay to the dealer the full value of any business goodwill which the dealer enjoys at the time he is notified of the termination, cancellation or refusal to renew.
>
> (2) The distributor shall make the payment required by this subsection within 30 days from the effec-

---

[4] Of course, a notice given pursuant to section 2804 might become so stale that it is no longer effective. Here, however, it is undisputable that BP acted diligently in keeping its franchises advised of the status of its plans and negotiations and that it effected its market withdrawal within a reasonable period of time after announcing its intention to do so.

tive date of the termination, cancellation or refusal to renew.

(3) This subsection does not apply if the dealer materially breaches the marketing agreement.

Maryland Code Ann., Commercial Law Art., section ll-304(i). On its face, this provision appears to require the payment of goodwill to plaintiffs. BP makes several arguments why this is not so.

First, BP contends that paragraph 29 of the Dealer License Agreement which it had with its franchisees provides a formula by which a dealer's goodwill is to be measured. It is undisputed that under that formula no goodwill payments are due to plaintiffs. Paragraph 29 might be relevant evidence in determining the factual question of what, if any, goodwill plaintiffs had in their stations. However, it is precisely this type of provision imposed by refiner fiat upon a franchise relationship which both the PMPA and the Maryland Act are designed to protect against. Therefore, to the extent that the formula provided in paragraph 29 is not supportable by independent evidence, it is void.[5]

Second, BP contends that, in the words of the Maryland Act, what is involved in this case is not a "termination" but a "reasonable nonrenewal" for which no payment for goodwill is payable. There is no legislative history to the Maryland Act and both parties frankly concede that it is virtually impossible to determine exactly what the Maryland General Assembly had in mind when it distinguished between "terminations," "cancellations" and "unreasonable nonrenewals". The Maryland Act was enacted prior to the PMPA, and therefore it cannot automatically be assumed that the words used in the two statutes have the same meaning. By the same token, however, there is reason to assume that the General Assembly - which has not amended section ll-204(i) since the PMPA was enacted - intended that what would be a unlawful

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[5] BP also makes a subsidiary contention that because the sales volume at the stations of all plaintiffs except one declined, plaintiffs have failed to allege facts sufficient to show that they lost any goodwill. Clearly, the question of the value, if any, of the goodwill lost by plaintiffs is a factual one which is inappropriate to resolve by summary judgment, at least on the present state of the record which is entirely undeveloped on that question.

nonrenewal under federal law could be a reasonable nonrenewal under Maryland law. Here, since BP's notice of termination dated April 18, 1985 was not given, as would be required under 15 U.S.C. sections 2804(b)(2), more than 180 days before April 30, 1985 (the expiration date of plaintiffs' franchises),[6] it seems clear that a termination rather than a nonrenewal was involved.

Third, BP contends that the goodwill provision of the Maryland Act is preempted by the PMPA. See 15 U.S.C. section 2806(a). According to BP, the section is a "provision of . . . law . . . with respect to termination" which provides a "remedy or penalty applicable to any violation thereof." Plaintiffs, on the other hand, contend that the goodwill provision of the Maryland Act does not seek to regulate terminations or nonrenewals and does not impose any remedy or penalty for its violation. Rather, it simply provides compensation to franchisees for losses which they suffer in the event that their franchises are lawfully brought to an end.[7]

Bellmore v. Mobil Oil Corp., 738 F.2d 300 (2d Cir. 1986), is directly on point. There, the Court upheld a provision of the Connecticut Gasoline Dealer's Act essentially comparable to the provision here in question. *Bellmore* is generally in accord with the approach to preemption questions under the PMPA which has been taken by other judges in this district. Where provisions of state law do not conflict with the procedural and enforcement provisions of the PMPA but provide supplemental terms govern-

---

[6] The termination date of one of the plaintiffs' franchises was not until June 30, 1986. Undisputably, his franchise was "terminated".

[7] It might seem that dealers who accepted a franchise offer from Crown would be unjustly enriched by permitting them to receive a goodwill payment while simultaneously retaining their goodwill by operating a station at the same location. However, this possibly duplicative payment is at least partially offset by the fact that the dealers have had a new franchisor thrust upon them whose franchise agreement includes terms (such as 24 hour service and non-competition provisions) which were not in the BP franchise and which the dealers find onerous. Furthermore, in selling its interest in the stations to Crown BP was in a position to receive (and may well have received) payment for the goodwill which had been generated at the stations. It certainly is in the province of the Maryland legislature to determine that under such circumstances it is the dealer and not the refiner who should receive compensation for the goodwill.

ing the franchise relationship, they are held not to be preempted. *See, e.g., Eden v. Texaco Refining and Marketing, Inc.*, 644 F.Supp. 1537 (D.Md. 1986). This holding is consistent with the view of the Fourth Circuit that preemption should be found only where the state law provision conflict[s] with Congress' objective of establishing a "single, uniform set of rules governing the grounds for termination and nonrenewal of motor fuel marketing franchises." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 361 (4th Cir. 1986), quoting from S. Rep. No. 731, 95th Cong. 2d Sess. 19, 1978 *U.S. Code Cong. & Admin. News* 877.

For these reasons, BP's motion for summary judgment will be granted as to the claims asserted by plaintiffs Ray, Uzarowski, Chung and Jimenez asserting a violation of the PMPA, and plaintiff's motion for summary judgment will be granted on for their claims for goodwill under the maryland statute.

Date: January 7, 1987

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANCISCO S. JIMENEZ	*	
	*	
v	*	Civil No. JFM-86-785
	*	
BP OIL, Inc.	*	
	*********	
CARLOS HORCASITAS	*	
	*	
v.	*	Civil No. JFM-86-813
	*	
BP OIL, INC.	*	
	*********	
JAMES G. PALMER, et al.	*	
	*	
v.	*	Civil No. JFM-86-1007
	*	
BP OIL, INC.	*	
	*********	

ORDER

For the reasons stated in the memorandum entered herein, it is this 7th day of January 1987

ORDERED

1. Plaintiffs' motion for partial summary judgment is granted on the issue of liability as to their claims for payment of goodwill under the Maryland Gasohol and Gasoline Products Marketing Act; and

2. Defendant's motion for summary judgment is granted as to the claims by plaintiffs Ray, Uzarowski, Chung and Jimenez under the Petroleum Marketing Practices Act.

J. Frederick Motz
United States District Judge

APPENDIX C

ORDER OF THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3843
No. 87-3854
No. 87-3855

Francisco S. Jiminez, et al.,

Plaintiffs-Appellees,

v.

BP Oil, Inc.,

Defendant-Appellant.

On Petition for Rehearing

Upon consideration of appellees' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Widener and Judge Michael, United States District Judge sitting by designation.

For the Court

CLERK

Filed November 16, 1988

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR
CLERK

(2)

No. 88-1336

In the

Supreme Court of the United States

October Term, 1988

FRANCISCO S. JIMINEZ, et al.,

Petitioners,

v.

BP OIL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The threshold Question Presented is whether there is, in fact, a conflict between the decision of the Fourth Circuit in the case at bar and the two decisions cited by Petitioners from the First and Second Circuits.

The underlying substantive question, which will only be reached if this Court grants *certiorari,* is as follows:

> Whether the Petroleum Marketing Practices Act ("PMPA"), which permits a petroleum distributor to withdraw from the marketing of gasoline in a relevant geographical area, thereby terminating the franchises with its dealers—provided
>
> > (1) it first offers to sell to its franchisees or grants to them a right of first refusal to buy its leased retail outlets, or
> >
> > (2) in the case of a sale of the leased premises to another distributor, the latter grants non-discriminatory franchises to those dealers—
>
> and which prohibits any state or local subdivision from enforcing any provision of local law regulating such termination, including any remedy or penalty applicable thereto, preempts a Maryland statute purporting to grant to any such terminated dealer a right to recover, from the withdrawing distributor, compensation for loss of goodwill.

LIST OF PARTIES
OPINIONS BELOW
JURISDICTION
STATUTORY PROVISIONS INVOLVED
STATEMENT OF THE CASE

Respondent adopts Petitioners' List of Parties, Opinions Below, Jurisdiction, Statutory Provisions Involved, and Statement of the Case as set forth in the Petition except that:

(1) We take issue with the characterization in Footnote 2 on Page 3 of the Petition that there were any "radical" differences between the contracts offered by Crown and the pre-existing ones in effect with the Respondent. This adjective was not used by the District Court.

(2) We also take issue with the rhetoric in the concluding paragraph of the Statement of The Case that there is any conflict between the decision in the case at bar and decisions of the First and Second Circuits. As demonstrated below, there is no such conflict.

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No. 88-1336

In the

Supreme Court of the United States

October Term, 1988

FRANCISCO S. JIMINEZ, et al.,

Petitioners,

v.

BP OIL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, BP Oil, Inc., respectfully prays that the Court deny the Petition for Writ of Certiorari sought by the Petitioners, Francisco S. Jiminez, et al., to review the opinion of the United States Court of Appeals for the Fourth Circuit entered on August 8, 1988 and the denial of the petition for rehearing entered on November 16, 1988.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS

The Petitioners would have this Court believe that the decision in the case at bar is in conflict with the decisions of the First Circuit in *Esso Std. Oil Co. v. Dep't of Consumer Affairs,* 793 F.2d 431 (1st Cir. 1986) and the Second Circuit in *Bellmore v. Mobil Oil Corporation,* 783 F.2d 300 (2d Cir. 1986). As to *Consumer Affairs* the contention is frivolous and as to *Bellmore* it is fallacious.

The *Consumer Affairs* case dealt with a local *rent control law* and had nothing to do with a state requirement for the payment for goodwill on termination of a gasoline distributorship. Of course, state laws regulating the industry which do not affect terminations, cancellations or refusals to renew, except incidentally, are not preempted by PMPA. Several cases to this effect are collected in the footnote.[1] In *Consumer Affairs* the First Circuit went out of its way to draw the distinction as follows:

> "The preemption provision of the PMPA would clearly invalidate any DOCA regulation that set rental rates for a franchise *and then* did not allow a franchisor to terminate or not renew a franchise if it did not wish to accept that established rate. That is, any law that gave a franchisee a cause of action to contest a termination of a franchise, when that termina-

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1. In addition to *Consumer Affairs,* cited in the text and involving rent control, see: *Exxon Corp. v. Georgia Ass'n of Petroleum Dealers,* 484 F. Supp. 1008, 1018 (D. Ga. 1979) involving hours of operation; *L. C. Williams Oil Co. v. Exxon Corp.,* 627 F. Supp. 864 (M.D. N.C. 1985) involving unfair competition; *Davis v. Gulf Oil Corp.,* 485 A. 2d 160, 169 (D.C. App. 1984) involving franchise terms; and *Barnes v. Gulf Oil Corporation,* 795 F.2d 358, 360 (4th Cir. 1986) involving a franchisee's assignment rights.

> tion would otherwise be valid under the PMPA, would be preempted by the PMPA." (Emphasis in text. 793 F.2d at 434)

Far from being in conflict with the decision in the case at bar, *Consumer Affairs* supports it: if the local regulation does not impact on a termination, it is not preempted. That is, unless it imposes a condition on a termination that is otherwise valid under PMPA or a remedy or penalty upon the exercise of that privilege, the question of preemption does not even arise.[2]

The decision of the Second Circuit in *Bellmore,* by contrast, is a case which does uphold a state statute requiring payments for goodwill by a distributor who terminates a franchise, even if the termination is valid under PMPA. The critical distinction, however, as noted by the Fourth Circuit, is that *Bellmore did not involve a market withdrawal* where the dealer stays on at his old location as the owner or as lessee under the aegis of a new distributor. In such instances any "goodwill" generated by the dealer at that location remains with him. Thus, as noted by the Fourth Circuit, the goodwill payment sought in the instant case "may be more readily characterized as a penalty than could the payments sought in *Bellmore.*" 853 F.2d at 272; P. App. A. at 11a.

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2. The First Circuit has, in fact, been a staunch supporter of preemption in other cases where a distributor has been found in compliance with the PMPA. So, in *Veracka v. Shell Oil Co.,* 655 F.2d 445 (1st Cir. 1981) the court said: "Thus, an event that constitutes good cause under federal law must also constitute good cause under the similar state statute [citations omitted]. And Shell has therefore complied with the Massachusetts Act." (665 F.2d at 450).

The PMPA recognizes the important distinction between (1) an outright termination, cancellation or refusal to renew and (2) a *bona fide* market withdrawal. In the former, after complying with notice requirements and strict grounds for termination, the distributor is free to walk away from the dealer, leaving him high and dry (as in *Bellmore*), whereas in a withdrawal (as in the case at bar) a distributor must either offer to sell the locations to its dealers or arrange for their transfer to another distributor who will maintain those dealers at their old locations under arrangements that are non-discriminatory vis-a-vis the new franchisor's other dealers. PMPA § 2802 (E) (iii).

Although the principal motivation underlying the PMPA may have been to protect the interests of service station franchisees, the pattern of the statute itself as well as the legislative history show that it was intended "to strike a balance between the at times conflicting interests of the parties to the relationship." U.S. Code Cong. & Admin. News 1978 at 874. Nowhere is this balancing act more apparent than in the special provisions governing a market withdrawal from a defined geographical area.

Thus, the PMPA prohibits a distributor from terminating an individual franchise simply because the location is unprofitable, but when it makes a *bona fide* business decision to pull out entirely from a marketing area, thereby terminating its relationship with all dealers in that area, the PMPA permits it to do so. This is an advantage for the distributor but it is counterbalanced by § 2802(E) (iii) which mandates special provisions to preserve any goodwill held by the dealer, *i.e.*, he must either be given

the opportunity to buy his outlet or receive a non-discriminatory lease from the new distributor. Thus, Congress has fashioned, on the one hand, flexibility for the distributor's legitimate business interests and, on the other hand, protection for the dealer's goodwill with his customers that may have been generated at terminated locations.

It would upset the fine balance drawn by Congress if, in the case of a market withdrawal, a jury were allowed to speculate on damages for loss of goodwill where, in fact, no goodwill has been lost. It is for this reason that the Fourth Circuit was correct in saying that the mandate of a goodwill payment, where termination is caused by a market withdrawal, takes on the character of a "penalty."

The opinion of the Fourth Circuit in the case at bar clearly limited its holding to a *bona fide* market withdrawal in compliance with PMPA. The decision has no effect on any future case arising in that circuit which may be on all fours with *Bellmore*. Unless and until the Fourth Circuit takes the next step by declaring the Maryland goodwill statute preempted in the case of *all* terminations, whether or not they involve a market withdrawal, there will remain no conflict between these circuits.

The bulk of Petitioners' arguments on the issue of a conflict in the circuits centers around *Consumer Affairs* from the First and *Bellmore* from the Second Circuit. However, at the bottom of page 4 of the Petition there is thrown in for good measure an alleged conflict with the Sixth Circuit, an apparent reference to *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986)

which is cited but not discussed on page 11 of the Petition. Consistent with the rationale in *Bellmore,* it invoked preemption to deny state court claims under a Michigan statute dealing with fraud and misrepresentation because it "has the direct effect of imposing a longer notice requirement upon Texaco than that required under the PMPA" (804 F.2d at 915). The decision has, however, absolutely nothing to do with the case at bar, much less present any conflict between the Fourth and Sixth Circuits. Dealing with different facts and different state statutes, the doctrine of preemption was invoked for different reasons both in *Consumers Petroleum* and in the instant case.

The material at the bottom of page 15 of the Petition is misleading. In *Eden v. Texaco Refining and Marketing, Inc.,* 644 F. Supp. 1573 (D. Md. 1986) the District Court for the District of Maryland enforced a Maryland statute requiring franchisor and franchisee to negotiate in good faith the question of hours of operation, the court holding this particular distributor guilty of bad faith in this process. In *Vasco v. Mobil Oil Corporation,* 698 F. Supp. 102 (D. Md. 1988) the same court held the same local statute preempted because the distributor had acted in good faith in adopting a nationwide policy governing hours of operation in accordance with § 2802(b)(3) of PMPA.

Counsel of record for the Petitioners in the case at bar was also counsel for the plaintiffs in *Eden* and *Vasco* and should have been aware of the difference in the two cases. Yet these decisions have been cited in the Petition for the apparent purpose of suggesting to the Court that confusion reigns supreme among the lower federal courts over the preemption issue. That is simply not true. And

even if *Eden* and *Vasco* were in conflict, the problem would not have been caused by the case at bar which had no bearing on either case.

II. THE CASE AT BAR WAS CORRECTLY DECIDED BY THE FOURTH CIRCUIT

Much of the Petition for Writ of *Certiorari* consists of argumentative material assailing the decision of the Fourth Circuit. These contentions would be more appropriate after the Court has granted *certiorari* than before. At this stage the sole question before the Court is whether or not the decision should be reviewed.

It has already been established that there is no conflict in the circuits. There remains only to be resolved, therefore, whether there exists any of the other grounds for granting *certiorari* as provided in Rule 17 of the Supreme Court Rules. Nothing has been advanced by Petitioners to suggest that this is the case.

The decision in the instant case simply holds that where a specific course of conduct (in this case, a market withdrawal by a petroleum distributor) is sanctioned by federal law (in this case the PMPA), the express provisions of that law mandating preemption preclude any entry into that field by a state law which directly impinges on the area of federal regulation. This conclusion is compelled by standard principles of constitutional law governing the Supremacy Clause. *Michigan Canners & Freezers Ass'n. v. Agricultural Mktg. & Bargaining Board*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed. 399 (1984); *Fidelity Fed. Savings & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed. 664 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

CONCLUSION

For the reasons above stated, the Respondent respectfully submits that the Writ of Certiorari should be denied.

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